

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 26

24STCV02282

**MONICA SANCHEZ vs UNITE EUROTHERAPY, INC., A
CALIFORNIA CORPORATION**

July 15, 2024

8:30 AM

Judge: Honorable Rolf M. Treu
Judicial Assistant: N DiGiambattista
Courtroom Assistant: A Munoz

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Scott Ferrell (Telephonic)

For Defendant(s): Marisa Janine-Page BY: Joseph Radochonski (Telephonic)

NATURE OF PROCEEDINGS: DEFENDANT UNITE EUROTHERAPY, INC.'S NOTICE OF MOTION AND MOTION TO STRIKE

Matter comes on for hearing.

Counsel argue the court's posted tentative ruling which is set forth below:

Defendant Unite Eurotherapy, Inc.'s motion to strike paragraph 30 and prayer for relief, paragraph (a) is DENIED.

I. BACKGROUND

On January 30, 2024, Plaintiff Monica Sanchez ("Plaintiff") brought this California Invasion of Privacy Act ("CIPA") action against Defendant Unite Eurotherapy, Inc. dba www.unitehair.com ("Defendant").

Plaintiff alleges upon visiting Defendant's website, Defendant secretly accessed Plaintiff's device and installed "pen register" and "trap and trace" tracking software in violation of California law without her knowledge or consent.

On March 7, 2024, Defendant filed a Motion to Strike, arguing:

- Plaintiff's requests for punitive damages is supported by conclusory allegations, which are deficient;

- The statutory penalty under Penal Code Section 638.51 is Plaintiff's exclusive remedy; and

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· Plaintiff does not allege any facts supporting or showing entitlement to attorneys' fees.

In opposition, Plaintiff argues that:

- The Complaint alleges conduct intended by Defendant to cause injury to Plaintiff;
- The Complaint alleges despicable conduct;
- It is reasonable to infer from the Complaint's allegations that Defendant's employees formulated a policy to allow spyware onto its website to unlawfully track visitors' online browsing;
- Plaintiff is allowed to seek to recover both punitive and statutory penalties at the pleading stage under *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253; and
- Plaintiff's request for attorneys' fees under the private attorney general statute, i.e., Code of Civil Procedure Section 1021.5 should not be stricken.

As of July 12, 2024, no reply brief has been filed.

II. ANALYSIS

A. Legal Standard for Motion to Strike

“Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof, but this time limitation shall not apply to motions specified in subdivision (e).” (Code Civ. Proc., § 435, subd. (b)(1).)

“The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper:

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(a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.”

(Code Civ. Proc., § 436.)

B. Meet and Confer

Prior to filing a motion to strike, the moving party is required to meet and confer with the party who filed the pleading that is subject to the motion to strike for the purposes of determining whether an agreement can be reached through a filing of an amended pleading that would resolve the objections to be raised in the motion to strike. (Code Civ. Proc., § 435.5.)*lll*

Here, Defendant advances the declaration of its counsel of record, Melissa W. Woo, attesting to attempted meet and confer efforts prior to filing the instant motion. Woo declares that she contacted Plaintiff’s counsel to meet and confer about the contents of the motion and requested an extension to respond in order to facilitate the meet and confer process. (Woo Decl., ¶2.) Woo further states that Plaintiff’s counsel denied her request for an extension. (Id.)

Therefore, the Court finds that Defendant has not fulfilled the meet and confer requirement. However, Defendant did attempt to meet and confer. As such, the Court will exercise its discretion and rule on the merits below.

C. Analysis

Defendant moves to strike paragraph 30 and prayer for relief, paragraph (a) on the grounds that the Complaint does not support a request for punitive damages and attorneys’ fees. Furthermore, Defendant contends that statutory penalties are Plaintiff’s exclusive remedy, thus she cannot request punitive damages.

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1. Punitive Damages

To state a claim for punitive damages under Civil Code section 3294, a plaintiff must allege specific facts showing that the defendant has been guilty of malice, oppression or fraud. (Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1042.) The basis for punitive damages must be pled with specificity; conclusory allegations devoid of any factual assertions are insufficient. (Id.) A motion to strike may lie where the facts alleged, if proven, would not support a finding that the defendant acted with malice, fraud or oppression. (Turman v. Turning Point of Central California (2010) 191 Cal. App. 4th 53, 63.)

“Malice” is defined in section 3294(c)(1) as “conduct which is intended by the defendant to cause injury” or “despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.” “Oppression” is defined in section 3294(c)(2) as “despicable conduct subjecting a person to cruel and unjust hardship in conscious disregard of that person’s rights.” The term “despicable” has been defined in the case law as actions that are “base,” “vile,” or “contemptible.” (See, e.g., Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal. App. 4th 847, 891.) “Fraud” is defined in section 3294(c)(3) as “an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.”

To prove that a defendant acted with “willful and conscious disregard of the rights or safety of others,” it is not enough to prove negligence, gross negligence or even recklessness. (Dawes v. Superior Court (1980) 111 Cal. App. 3d 82, 87.) Rather, a plaintiff must allege facts demonstrating that “the defendant acted in such an outrageous and reprehensible manner that the jury could infer that he [or she] knowingly disregarded the substantial certainty of injury to others.” (Id. at 90). Further, the allegations must be sufficient for a reasonable jury to conclude that Defendant’s conduct was “despicable” defined as “base, vile or contemptible.” (College Hospital Inc. v. Superior Court (1994) 8 Cal. 4th 704, 725.)

Here, the Complaint states sufficient facts to support Plaintiff’s request for punitive damages. The Complaint alleges when Plaintiff visited Defendant’s website, Defendant secretly accessed

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Plaintiff's device and installed spy tracking software. (Compl., at 2:2-23; ¶¶18-25; 28-30.) The Complaint further alleges the tracking spyware embedded at least one PR/TT beacon to discover the identity and geolocation of every website visitor. (Id.) The Complaint also alleges that this type of conduct is prohibited without first obtaining a court order under California Penal Code Section 638.51. (Id.) As such, a reasonable jury could conclude that Defendant's conduct of engaging in purported criminal activity is vile or contemptible. A reasonable jury could also conclude Defendant's conduct of intentionally invading consumers privacy without their knowledge or consent was done with willful and conscious disregard to the privacy rights of their website visitors.

Therefore, the motion is DENIED on the punitive damages ground.

2. Statutory Damages

California Penal Code Section 638.51, provides in pertinent part, "Except as provided in subdivision (b), a person may not install or use a pen register or a trap and trace device without first obtaining a court order pursuant to Section 638.52 or 638.53." (Code Civ. Proc., § 638.51(a).) "A violation of this section is punishable by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by both that fine and imprisonment." (Code Civ. Proc., § 638.51(c).)

Under *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, the court held where the complaint alleges sufficient facts for both common law invasion of privacy and a statutory wiretapping violations under Penal Code Section 637.2(a), plaintiffs were entitled to seek both punitive damages and statutory penalties. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1256.) Furthermore, the *Clauson* court stated, "Once the verdict is returned, plaintiffs, if they prevail, may then elect whether to accept the Penal Code section 637.2, subdivision (a) statutory penalties or the punitive damages award." (Id.) This present case is similar to the issue addressed in *Clauson*.

Here, Plaintiff seeks both punitive damages and statutory penalties under Penal Code Section 637.2(a). (Compl., at 9:6-7, ¶31.) However, *Clauson* is binding authority in California and stands for the proposition that Plaintiff can in fact in the pleading stage request both statutory penalties

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and punitive damages. By contrast, the cases cited by Defendant do not address Penal Code Section 637.2(a). (Mot. at 7:6-21.)

Therefore, the statutory penalty under Penal Code Section 637.2(a) is not Plaintiff's exclusive remedy at this time.

3. Attorney Fees

Code of Civil Procedure Section 1021.5, states in pertinent part, "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." (Code Civ. Proc., § 1021.5.)

Here, the Complaint alleges the right to privacy is a legally protected interest. (Compl., ¶¶6-8.) Furthermore, the Complaint alleges Plaintiff brings forth this action to enforce her right to privacy under CIPA and other California website users. (Compl., ¶¶26-31.) As such, if Plaintiff ultimately prevails in this action, she may be awarded attorneys' fees in accordance with Code of Civil Procedure Section 1021.5.

Therefore, the motion is DENIED on the attorneys' fees ground.

III. DISPOSITION

Based on the foregoing, Defendant Unite Eurotherapy, Inc.'s motion to strike is DENIED.

The court takes the matter under submission.

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LATER: The court rules as follows:

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After considering the arguments of counsel and after reviewing the court's ruling, the court amends its tentative ruling as follows:

- .
1. The motion to strike punitive damages is granted (Civil Code Section 3294(b)).
2. Twenty days leave to amend.

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Other than these two changes, the court's posted tentative ruling is adopted as the order of the court.

A copy of this minute order is mailed via U.S. Mail to counsel of record.

Certificate of Mailing is attached.